United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

No. 74-2211

United States Court of Appeals

FOR THE SECOND CIRCUIT

LOCALS 700, 743 AND 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review of an Order of the National Labor Relations Board

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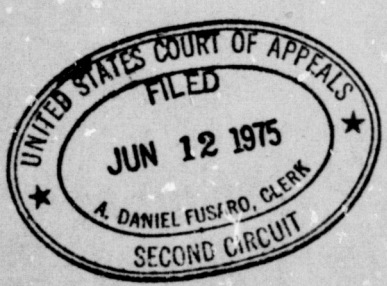
REPLY BRIEF FOR PETITIONERS



PLATO E. PAPPS
Machinists Building
Washington, D.C. 20036

MOZART G. RATNER
818 18th Street, N.W.
Washington D.C. 20006

Attorneys for Petitioners

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REPLY BRIEF FOR PETITIONERS

I. THE BOARD ERRED IN REMITTING THE PARTIES TO ARBITRATION WITH RESPECT TO PARAGRAPHS 9, 10, and 11 OF THE GENERAL COUNSEL'S COMPLAINT

A. The Board's brief (Bd. Br.) does not even attempt to respond to our demonstration of identity between the type and quality of unfair labor practices which were held in earlier cases to evidence "a pattern of continuing anti-union conduct" by United Aircraft and the type and quality of anti-union conduct involved in No. 74-1035 and here,[1] which a majority held does not "reflect a pattern of continuation" (J.A. 74-1035, p. 845).

[1] See our opening brief in No. 74-1035, pp. 29-33 and our opening brief herein, pp. 15-19.

Indeed, its brief denies (p. 29), that the Board's "maturation" finding refers to *any* change in United Aircraft's policies or practices, and says it refers *only* to "the successful resolution of certain of [the parties'] disputes through the contractual procedure."

"Of course, it is close to the heart of our disagreement with the Board's position that we do not regard disposition of particular individual grievances as a "successful resolution" of the underlying *cause* of the "disputes," which is the Company's found hostility to *effective* union representation and admitted failure to take steps adequate to *prevent* violations of the Act.[2] Because the "individual dispute resolution" criterion ignores this "underlying problem" (J.A. 74-1035, p. 843), the Board's resort to it constitutes arbitrary abdication of its statutory power and duty "to prevent" unfair labor practices—(Act, § 10 (a)).[3] The Company's tenacious effort to channel all charges against it away from the Board and into arbitration betrays the implausibility of any suggestion that the contractual dispute procedure is "successful" in effectuating the *statutory* purpose, particularly in light of Board's anticipation of future unfair labor practices by the Company. (Bd. Br. No. 74-1035, pp. 31-33.)[4] In short, both

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[2] See our opening brief in No. 74-1035, pp. 34-37, our reply brief in that case, pp. 5-8, 10-12, 14, 16, and our opening brief herein, pp. 15-20.

[3] Thus, "the question" which, according to Board counsel, the Board here addressed (Bd. Br. 21), "whether there was a sufficient likelihood that [the particular] disputes [in these cases] could be fairly and effectively resolved through the contract procedure * * *," is far wide of the statutory mark.

[4] Board counsel assert that "the inquiry whether contract procedures offer a sufficient promise of resolving disputes fairly and effectively to justify a temporary withholding of Board processes is not advanced by speculation about the motives of the parties for preferring one forum or the other" (Bd. Br. 24, n. 14). While the Company's objective need not be shown to establish that the Board's inaction is irreconcilable with its statutory duty, the Company's motive is indeed helpful in evaluating the potential consequences of the Board's decision. As Mr. Chief Justice Hughes wrote in a very early labor case, "motive is a persuasive interpreter of equivocal conduct" (*Texas & N.O.R. Co.* v. *Brotherhood of Railway & S.S. Clerks*, 281 U.S. 548, 559).

"maturation" and "success" have been given meanings in these decisions which are totally divorced from the objective which the Board was created by Congress to achieve.

Even accepting as sufficient the Board's limited concession that deferral is inappropriate in the face of "a continuing pattern of efforts to defeat the purposes of our Act" (J.A. 74-1035, p. 843), it is "arbitrary treatment amounting to an abuse of discretion" (*Herbert Harvey, Inc.* v. *NLRB*, 424 F.2d 770, 780 (D.C. Cir., 1969)), for the majority to adopt for this date and plane only, the universally rejected (see our opening brief in No. 74-1035, pp. 34-37) theory that "a pattern of continuing anti-union conduct" is not such, absent proof that it was "orchestrated by the [highest officials of] the Company" (Bd. Br. 18),[5] as part of "a grand design * * * to repudiate the Union as bargaining agent" (Bd. Br. 22).[6] See also, *Garrett* v. *F.C.C.*, D.C. Cir., June 2, 1975, slip op. pp. 613-614.

Board counsels' attempt to justify the Board's unprecedented embrace of the "individual," "personal," misconduct of "minor supervisors" approach (Bd. Br. 17, 20-22), instead further betrays its indefensibility. Thus, they assert that General Foreman Downing's " 'anti-union diatribe and his surveillance and harrassment of union steward Weingarten' * * * rather than indicating a planned effort to sabotage the Union, suggest an individual dispute * * * " *id.* p. 21). What this characterization overlooks

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5 Thus counsel argue, at Bd. Br. 22, that "the Company" should not be held chargeable for the conduct of *General Foreman* Taskavin and Foreman Valenti because "[i]f *the Company* had wanted to discredit the Union in the eyes of the current employees, it could surely have devised a story better calculated to serve the purpose." (Emphasis added.) The argument overlooks that, as a matter of law, and in the eyes of employees, their supervisors *are* "the Company." See § 2(13) of the Act.

6 Board counsel do not respond to our showing, reply brief in No. 74-1035, p. 10, and the General Counsel's claim, J.A. 126, that United Aircraft has a more modest, but equally illegal, objective—to *weaken* the Union *without* destroying it as bargaining agent. See also our opening brief in the companion case, pp. 34-37 and our opening brief herein, pp. 15-18.

is that General Foreman Weingarten, like General Foreman Taskavin and Foreman Valenti, and all the other supervisors involved in No. 74-1035 (see our opening brief in that case, pp. 7-24), obviously felt free to express viciously anti-union sentiments and engage in flagrantly illegal anti-union conduct *without fear of incurring higher management's displeasure.* The impression of management approbation is a direct consequence of the Company's pattern of illegal acts and conduct, as found by the Board and this Court; its unvarying defense and support of supervisors' misconduct, no matter how flagrant;[7] and its failure to take any steps to restrain supervisors from illegally indulging their "individual" anti-unionism.

The Company does not even assert, and the Board perforce did not find, that United Aircraft did *anything* to prevent its supervisors and other agents from continuing the historic pattern of anti-union acts and conduct. Undeterred by fear of any adverse reaction from top management, it was simply inevitable that such misconduct by subordinates would continue. Board counsel do not even purport to deny (see our reply brief in No. 74-1035, p. 11) that only the realistic threat of contempt sanctions could induce United Aircraft to take steps effectively to prevent it.

Thus, it is history that makes the crucial difference between United Aircraft and other "organized plants of this size" where, *absent a background of anti-union animus and practice,* "some conflicts between management personnel and union representatives or adherents" may be

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[7] While the Board's brief disavows the characterization of General Foreman Downing's activity as "normal and wholesome" (p. 21), he and the Company's other supervisors are more likely to guide their actions by the attitude of the Company which pays, and has the power to discharge them. And it is the Company which describes as "normal and wholesome conflicts existing in an organized plant" the harrassment of union officials and members by their supervisors. While a party's litigation posture does not necessarily reflect its conduct in real life, experience demonstrates that such harrassment *is* "normal" at United Aircraft's organized plants, although, given the Company's absolute control over its supervisors, it would not be if it were not regarded as "wholesome" from the Company's point of view.

expected. (Bd. Br., p. 20). It is precisely this difference which brands as abdication the Board's application of *Collyer* here. Recognition that, in light of United Aircraft's history, deferral under *Collyer* would tend to encourage, or at least fail to do what the Board *can* do to prevent, future unfair labor practices, was the predicate of exempting United Aircraft from *Collyer* in *Sherman* and *National Radio*. The present decisions, which remove the exemption without even confronting the "prevention" issue, are plainly arbitrary, and the Board's refusal on these records to exercise its jurisdiction for the purpose of prevention is plainly in derogation of its statutory "power and duty." *National Licorice Co.* v. *Labor Board*, 309 U.S. 350, 364 (1940).

B. The Board's brief denies (pp. 22-23), that the Company's "purpose" in refusing to produce foremen's notebooks was to frustrate the Union's resort to the grievance procedure. But both Administrative Law Judge Pollock (J.A. 74-1035, p. 814), and Arbitrator Feinberg (J.A. herein, p. 93-94), held that the inherent *effect* of withholding *is* "sabotage of the grievance machinery" (Bd. Br. 22).[8] On these facts, the failure to find and remedy

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8 Thus, A. L. J. Pollock, above, held that "a foreman's merit rating can scarcely be tested without" access to foreman's notebooks, and Arbitrator Feinberg held that (J.A. 93):

> "* * * The basis of an employee's performance or merit rating lies peculiarly within the knowledge of the Company and unless appropriate documents, if they exist, supporting such rating are produced, the Union can not properly contest the rating or raise any question relating to particular incidents."

The Company's explanation, which Board counsel treat as "innocent"—its asserted desire to avoid "fishing expeditions"—is repetition of a tactic previously discredited, see *NLRB* v. *United Aircraft Corp.*, 200 F.Supp. 48, 50 (D. Conn., 1961), aff'd. *per curiam*, 300 F.2d 442 (2 Cir., 1961). Long ago this Court held:

> "* * * The rule governing disclosure of data of this kind is not unlike that prevailing in discovery procedures under modern codes. * * * Any less lenient rule in labor disputes would greatly hamper the bargaining process * * *." *NLRB* v. *Yawman & Erbe Mfg Co.*, 187 F.2d 947, 949 (2 Cir., 1951).

The Supreme Court agrees. *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 437.

the Company's violation of § 8(a)(5) is inconsistent with the Board's primary responsibility under § 10 as it was universally understood before *Collyer,* and also with what *Collyer* (and *a fortiori* the Board's present decisions) treat as the Board's overriding objective—to promote the grievance arbitration process. That was the Board's own understanding of *Collyer* until this case (see our brief in No. 74-1035, pp. 41-46), and the position the Board successfully pressed upon the Supreme Court in *NLRB* v. *Acme Industrial Co.,* 385 U.S. 432.

Board counsels' attempt (Br. Br. p. 23, n. 13) to cleanse Phelps' dishonest denial of "knowledge of any notebooks" is likewise unavailing. Repeating the General Counsel's inadvertent error of describing Phelps as "Plant Manager" (J.A. 39, but see J.A. 7), Board counsel imply that it was possible for Phelps to have been telling the truth.[9] The Board did not find that Phelps' denial was truthful; nor could it have, since it decided the case on summary judgment. Thus, as far as the Board's deferral policy is concerned, the honesty or dishonesty of a party's obstructions of the grievance procedure are not germane to its decision to defer. Board counsel apparently recognize this to be an indefensible position. Therefore, in yet another post-hoc rationalization, they vouch for Phelps' credibility. In any event, inasmuch as the Union's right to obtain access to foremen's notebooks in connection with merit rating grievances had been in contention since at least 1968 (J.A. 92), Phelps' denial that he had knowledge of any notebooks, in response to the shop steward's claim that the crucial data was in Foreman Pitney's notebooks, was calculated to convey management's contempt for the Union and for its role in the grievance procedure. Plainly, if Phelps was actually ignorant of whether Pitney had notebooks, the duty to

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[9] Actually, Phelps testified (J.A. 429), and Arbitrator Feinberg found (J.A. 86), that Phelps was "Assistant to the Manufacturing Manager," whose function was to represent all four Pratt & Whitney plants at Step 2 of the grievance procedure. (No. 74-1035, J.A. 429). As of July 27, 1971, Phelps had held that position "for five and a half years." (No. 74-1035, Tr. 3165). Representation of the company at Step 2 occupied "about 80 percent of [Phelps' time.]" [No. 74-1035, J.A. 3166).

bargain in good faith at the least called for him to offer to inquire.

C. Board counsel concede (Bd. Br. 25 n. 15, and accompanying text) that the Board "erred by stating that the disputes deferred here are 'covered by the provisions of the contracts providing for arbitration on the request of either party if the dispute is not settled under the grievance procedures.' * * * [T]he disputes deferred in this case [and the interrogation of Sullivan at issue in No. 74-1035] are covered by the contract provision authorizing arbitration *upon agreement of the parties.*" (Emphasis added.) See also *id.* 10, n. 4; 11-12, n. 5; cf. our reply brief in 74-1035, pp. 23-24 and our opening brief in this case pp. 20-21. They proceed then to argue that the Board's error is immaterial because "the Board does not require, as a precondition to deferral, that both parties be *obligated* to arbitrate a particular dispute" (Bd. Br. 26, see also, *id.* 28).

But the Board cases *do* hold *Collyer* inapplicable where, under the contract, an *ad hoc* agreement of the parties is necessary to arbitrate a particular dispute. *Tulsa-Whisenhunt Funeral Homes, Inc.*, 195 NLRB 106, n. 1 (1972). The Board described the *Tulsa-Whisenhunt* contract as follows:

> "* * * whenever the Respondent's general manager denies a grievance at the final step, the contract binds no one to any further procedure for peaceful resolution of the dispute. Thereafter, only by *ad hoc* agreement of the parties can any forum of third parties or a neutral arbitrator be convened to resolve the dispute. * * *".

The Board explicitly distinguished, and *did not* overrule *Tulsa-Whisenhunt* in *Western Electric,* 199 NLRB 326, n. 1 (1972), upon which Board counsel here rely.[10] In *Nabisco,*

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10 Thus, in *Western Electric, id.*, the Board said:

> "* * * It is clear to us from our examination of the contract that a dispute is arbitrable, upon request, after the exhaustion of the earlier steps of the grievance procedure, and the use of the term 'may' merely refers to the option to request or not request arbitration. Cf. *Tulsa-*

Inc. v. *NLRB*, 479 F.2d 770 (2 Cir. 1973), upon which Board counsel also rely, the parties were contractually bound to arbitrate if a majority of the joint committee so voted. This Court explicitly distinguished *Nabisco* from earlier Board decisions on this ground, 479 F.2d at 773, n. 3:

> "We do not believe the Board's previous decisions in Tulsa-Whisenhunt Funeral Homes, Inc., 195 N.L.R.B. No. 20 (1972), and District No. 10, Int'l. Ass'n of Machinists, 200 N.L.R.B. 165 (1972), were in any way inconsistent with the position it has taken here. In both those cases, the grievance procedures were at an end unless the parties themselves were willing to enter into an *ad hoc* arrangement for arbitration of their disputes."

If the Industrial Relations Director of United Aircraft denies an unlisted grievance at the fourth step ("Step 4"—J.A. 21), "the contract binds no one to any further procedure for peaceful resolution of the dispute". With respect to grievances other than those listed as arbitrable at the request of either party (Article VII, § 31(a), J.A. 21-23, 31), the contract explicitly provides (Article VII, § 3(b), J.A. 23; J.A. 74-1035, pp. 518, 593, 616):

> "Other grievances arising under this contract which are not settled at Step 4 of Section 1 of this Article may be referred to arbitration if the company and the union mutually agree in writing."

Thus, just as in *Tulsa-Whisenhunt,* and unlike *Nabisco,* arbitration of the subject grievances can be achieved only through *ad hoc* agreement of both parties.

Board counsel represent, however (Bd. Br. p. 27), that under the Board's policy

> "* * * it is sufficient if an agreed-upon contract procedure for binding arbitration is *available* to the charging party. The Company's offer to agree to arbitrate here made binding arbitration available to the Union under the contract. * * *" (Emphasis in original.)

Whisenhunt Funeral Homes, Inc., 195 NLRB No. 20, where *ad hoc* agreement of both parties was required before arbitration could be invoked."

The Court of Appeals agreed. *Local Union No. 2188, Int. Bro. of Elec. Wkrs.* v. *NLRB*, 494 F.2d 1087, 1091.

This means that if, as here (J.A. 19, 31, 32), the party charged with unfair labor practices makes a voluntary *ad hoc* offer to arbitrate the subject matter of those charges, the charging party is forced to accept the offer or suffer deferral. Assuming that this *is* the Board's *current* policy,[11] the Board's confessed factual error is of course immaterial;[12] the only question is whether the Board's new policy can be reconciled with Congress' policy as defined by the Supreme Court. This is yet another departure from *Collyer* itself where the Board purported "to require the parties here to honor their contractual obligations" to arbitrate (192 NLRB at 843). In this case, by contrast, the Board is

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11 There is no basis for that description of Board policy in the Board decisions. As the Board's signal, "See" properly admonishes, the *Western Electric* case cited *id.* does not support Board counsels' statement. There, as the Court of Appeals held, the dispute which was deferred was "clearly within the scope of the grievance and arbitration procedures at both the [employer's] plants." 494 F.2d, at 1091. It was this contractual undertaking to arbitrate which prompted deferral. The Company's expression of willingness to arbitrate in that case merely withdrew (and wiped the slate clean of) a prior refusal to arbitrate (despite the contractual requirement) which "was apparently based on [a] mistaken belief" concerning the issue which the union wished to arbitrate. *Id.* text and note at n. 5. In other words, whereas in *Western Electric* the Board and the court rested on both a contractual duty to arbitrate and a willingness to honor that duty, Board counsel here contend that *ad hoc* willingness to arbitrate, absent any duty, is sufficient.

12 The Board's factual error is likewise immaterial on the reasoning of the Board itself. Thus, the Board reaffirmed (J.A. 127, n. 4), the rule it enunciated in No. 74-1035 (J.A. 846, n. 5): "To the extent that there may be some question as to the arbitrability of some items, that issue is, of course, for the arbitrator . . ." The Board thus obviously considered the concurrence of all parties that these disputes were not arbitrable under the mandatory provisions of the agreement (J.A. 74-1035, pp. 855-856 (dissent), see also our reply brief in that case, pp. 23-24), to be immaterial. Board counsel's suggestion that petitioner should have sought "to call the Board's error to its attention" (Bd. Br. 25, n. 15, see also *id.* 27), overlooks that only *material* errors are within the scope of § 102.48(d)(1) of the Board's Rules and Regulations. *International Ladies Garment Workers Union* v. *Quality Mfg. Co.*, — U.S. —, 88 LRRM 2698, 2700, n. 3. In any event, the general preclusion of objections not properly raised below cannot require this Court to accept as true factual findings on which the Board has *confessed error;* a rule which would require reviewing courts to blind themselves to confessed errors would stultify the judiciary. Cf., *NLRB* v. *Red Spot Electric Co.*, 191 F.2d 697 (9 Cir., 1951).

creating a duty to arbitrate. This *defeats* "the celebrated affirmation [of the] national policy [declared in § 203(d)] in the *Steelworkers* Trilogy." (*Id.* at 840). See our opening brief pp. 20-22.

Board counsel have now improvised a new theme to rationalize deferral, namely, that arbitration provides quicker, and presumably therefore superior redress, than the "time consuming statutory procedures which in the present case have thus far consumed approximately 3½ years." (Bd. Br. 21, 27, 35.) Here again, the argument is the invention of Board counsel. It is hardly surprising that the Board did not in its decisions have the temerity to justify deferral herein on the basis of the Board's own delay in deciding to defer.[13] If the Board had treated these cases on their merits they could have been disposed of routinely and relatively promptly. Moreover, any discussion of delay in this context is misplaced, since "deferral" contemplates a process in which the parties are invited to return to the Board after the arbitrator has ruled. While the Board's *Maine* principle renders this invitation largely illusory, see Point II hereof, the Board has not yet attempted to persuade the courts that it may lawfully remit the parties to arbitration and thereby *terminate* the Board proceeding. Since the Board must defend its orders herein on their own terms, its comparison between the delay herein and the usual length of arbitration proceedings is simply irrelevant. In any event, while even unavoidable delay is regrettable, particularly for the parties seeking relief, see *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265-266, meaningful statutory relief to petitioners would not only be delayed if the Board prevails herein—it would be denied absolutely. See pp. 15, 18-19, *infra*.

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[13] Thus, in No. 74-1035, Judge Pollack issued his decision on the merits on April 17, 1972; the Board did not issue its decision refusing to consider the merits until July 10, 1973, 15 months later. In No. 74-2211, the case was transferred to the Board on August 3, 1973; the Board's decision to defer was not issued until September 3, 1974, 13 months later.

II. THE BOARD ERRED IN FAILING TO ADJUDICATE THE ISSUES IN PARAGRAPH 8b OF THE COMPLAINT.

In dismissing the General Counsel's allegation that the Company had violated §§ 8(a)(5) and 8(a)(1) by withholding records necessary for the operation of the grievance procedure, the Board purported to follow *Spielberg Mfg. Co.*, 112 NLRB 1080. The Board regarded that portion of the complaint as adequately disposed of by the arbitrator's determination that the Company had violated the contract by withholding the records and his direction to the Company to reopen the particular grievance involved after supplying the union with the previously withheld records. We submit that *Spielberg* contemplates rather that the Board will accept the arbitrator's factual findings and his conclusion that the Company was not privileged under the contract to withhold the information and, on those premises, determine whether the Company violated § 8(a)(5) and, if so, provide a remedy appropriate to effectuating the statutory policy.

Board counsels' response requires only a few additions to our original argument.

A. The Board's brief asserts (p. 29):

> "Thus, the Union may challenge the award as repugnant to the Act because of the alleged inadequacy of the remedy. But the Board will not assert jurisdiction merely because it would have ordered different relief had the matter been before it *de novo*."

This description of the ostensible issue cannot be reconciled with what the Board actually did in this case. The Board did not decline to "assert jurisdiction". Jurisdiction had been asserted by the issuance of the complaint and the dismissal was not for lack of jurisdiction. Rather, although the Union *did* "challenge the award as repugnant to the Act because of the alleged inadequacies of the remedy" the Board dismissed the complaint without even *considering* the alleged inadequacy of the arbitrator's

remedy in light of the remedies customarily ordered by the Board for such a violation. Thus, the right to challenge the award for inadequacy of remedy, which the Board ostensibly recognizes, is the wholly illusory one of presenting to the Board an argument which it will not consider.

B. Board Counsel assert that *Carey* v. *Westinghouse*, 375 U.S. 261, "is not inconsistent with this articulation of the Board's deferral policy" (Bd. Br. 29). If that statement is intended to refer to the articulation in Board counsels' brief, it is misleading because, as just shown, that articulation does not reflect the Board's actual practice. If the statement is intended to refer to what the Board actually did, it is incorrect. This is because when the Court in *Carey* "approved the Board's deferral policy" (Bd. Br. 29) (as indeed it did, our Br. 26), it did so with the understanding that the arbitration award would not be the termination of the Board proceeding, but would (with respect to the matters determined by the arbitrator) serve as a predicate for the Board's disposition of the case under the statute. Moreover, the *Carey* opinion says nothing about the scope of the inquiry into whether the arbitrator's determination was "repugnant to the Act" (375 U.S. at 271). In short, the Court approved the Board's practice of not allowing *"relitigation"* (see our Br. 27, text and note at n. 15), of matters decided by the arbitrator; it did not hold that the arbitration proceeding could be *a substitute* for the statutory proceeding.[14] On the contrary, *Carey* is one of the precedents which establishes that the contractual and statutory limitations are concurrent—the central proposition of law which our adversaries decline to discuss in their briefs in either of these cases.

C. Board counsel seek to reconcile the decision in this case and the first portion of the District of Columbia Circuit's opinion in the *Malrite* case, with the second portion

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[14] It may also be inaccurate, given what *Carey* says about the Board's "superior authority", 375 U.S. at 272.

of that opinion and the same court's decision in *Banyard* as follows (Bd. Br. p. 32):

> "But the authorities cited by the Union make clear that the required congruence of issues before the Board and the arbitrator is limited to substantive issues and does not extend to the question of appropriate remedial relief. Thus, in both *Local Union 715, I.B.E.W.* v. *N.L.R.B. (Malrite), supra,* 494 F.2d [1136] at 1138, and *Banyard* v. *N.L.R.B., supra,* 505 F.2d [342] at 348, the court recognized that where the substantive issues before the arbitrator and the Board are congruent and deferral is otherwise appropriate, 'the arbitration award becomes the remedy for both contractual and statutory violations.' "

Contrary to the innuendo of the Board's artful "Thus", the language which is quoted from *Banyard* and *Malrite* does not support its distinction between "substantive" and "remedial" issues, for the quoted sentence is immediately preceded by the following in *Banyard:*

> "Our approval of the Board's deferral under *Spielberg* of statutory issues to arbitral resolution along with contractual issues is conditioned upon the resolution by the arbitral tribunal of *congruent* statutory and contractual issues." 505 F.2d at 348 (emphasis in original).

It is plain therefore, that the distinction proffered by Board counsel between "statutory" and "remedial" is not the same as that adopted by the D.C. Circuit, namely, "statutory" and "contractual". Indeed, the supposed dichotomy between "statutory" and "remedial" issues is entirely false, since, of course, the question of an appropriate remedy for the commission of an unfair labor practice is itself a statutory issue under § 10(c) of the Act. See, *e.g.*, *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 194. By parity of reasoning, the dichotomy between "contractual" and "remedial" issues is incorrect since the question of the appropriate remedy for a contract violation is very much

a matter of interpretation of the contract as *Steelworkers* v. *Enterprise Mfg. Co.*, 363 U.S. 593, 597, teaches. Accordingly, the question of what is an appropriate remedy for the same act of misconduct depends on whether it is a contract right or a statutory right which is to be vindicated. Thus, where the arbitrator finds a violation of the contract his decision to impose a particular remedy is not "congruent" with the issue which the Labor Board is called upon to resolve after it has determined that the same conduct constitutes an unfair labor practice.

The contrast between the functions of the arbitrator and the Board in the remedial sphere is clearly delineated by the decisions of the Supreme Court. In *Enterprise,* while recognizing "the need * * * for flexibility in meeting a wide variety of situations" which the draftsman of the agreement "may never have thought of" the Court said (363 U.S. at 597):

> "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

By contrast, in *Phelps Dodge,* the Court said (313 U.S., at 194):

> "There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to

> limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. On the other hand, the power with which Congress invested the Board implies responsibility—the responsibility of exercising its judgment in employing the statutory powers.

The Board erred in this case by shunning the "responsibility of exercising its judgment in employing the statutory powers" to determine what remedy is appropriate for the misconduct charged in ¶ 8b of the complaint.

There is an additional and we think independently compelling reason why the Board's attempted distinction of *Banyard* is untenable. Our point is an intensely practical one. If it is held (by the Board or the Court) that the arbitrator's award may not be treated as dispositive, then the Board will proceed not only to adjudicate the unfair labor practice, but also, if it determines that an unfair labor practice was committed, to provide the appropriate remedy under § 10(c). This is what the Board did in *Banyard*.[15] Thus a party who is denied any relief at all by the arbitrator has *some* chance ultimately to receive the benefits of a cease and desist order by the Board. But under the decision in this case, and the distinction of *Banyard* now proffered, a party who prevails to *some* extent before the arbitrator has *no* chance of obtaining a statutory remedy. This paradoxical result can promote neither the arbitral process nor the policy of Title I of the NLRA.

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[15] *Banyard* involved two unfair labor practice proceedings before the Board, and they were considered separately on remand. In each the Board found an unfair labor practice and provided a remedy, including a cease and desist order. See *Roadway Express*, 217 NLRB No. 49 88 LRRM 1503, 1505 (April 2, 1975); *McLean Trucking Co.*, 216 NLRB No. 161, 88 LRRM 1649 (March 6, 1975).

D. The cases cited by the Board do not support its assertion that "the award would normally be dispositive of the same contract issues in any subsequent disputes between the parties" (Bd. Br. 32). Rather, those decisions support only the proposition that the award is dispositive with respect to subsequent efforts to litigate the *same dispute*. Nor is there any basis in either experience or precedent for counsel's suggestion that the arbitrator's award, though "framed in declaratory terms * * * would support a valid enforcement decree restraining future violations in a suit brought under § 301" (Bd. Br. 33).[16] To transmute a declaratory order into a cease and desist order against future violations assumes that the arbitrator was authorized to dispose of more than the immediate grievance before him. Moreover, a party is entitled to a judicial order enforcing an arbitration award only if the other party has *failed* to comply with its terms; by contrast, the Board can and frequently does seek Court enforcement of an unfair labor practice order even if the respondent agrees to comply therewith. It does so precisely in order to subject respondent to contempt sanctions if he again violates the Act in the manner proscribed by the order, and thereby to *deter* recurrence. It is for that reason that the breadth of the Board's order—and consequently that of the court—is frequently litigated as shown by *e.g.*, *NLRB* v. *Express Publishing Corp.*, 312 U.S. 426; *Labor Board* v. *Stowe Spinning Co.*, 336 U.S. 226; *Communications Workers* v. *NLRB*,

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[16] For one thoughtful view that the arbitrator should not issue a cease and desist order when he finds a violation of the contract see *Crane*, "The Use and Abuse of Arbitrable Power" in *Labor Arbitration at the Quarter-Century Mark—Proceedings of the 25th Annual Meeting of the National Academy of Arbitrators* (BNA 1973, pp. 66 *et seq.* at 72-74).

Longshoremen v. *Marine Trade Assn.*, 389 U.S. 64, illustrates the difficulties the courts face in enforcing a declaratory award. In *Longshoremen* the Court held that an Order of the court which simply directed a party to comply with such an award ran afoul of the specificity requirement in F.R.Civ.P., Rule 65(d). The only case cited at Bd. Br. 33, n. 20, which is even remotely in point (*Westinghouse*) not only antedates *Longshoremen* but involved an employer who refused entirely to abide by the award.

362 U.S. 479. Even where the first arbitrator's award is treated as a precedent under the same contract by subsequent arbitrators, subsequent future violation of the contract do not carry with them a contempt sanction.

E. In sum, while, as we have acknowledged, the first portion of the *Malrite* opinion is inconsistent with our views, the second portion of that opinion and the District of Columbia Circuit's subsequent elaboration of its views in *Banyard* accords fully with the position which we have taken. Plainly, the matter is one of first impression in this Court, and while we commend the *Banyard* opinion to this Court's attention, we ask nothing more than that the issue be given full *de novo* consideration.

CONCLUSION

We fear that the length of the submissions in this case and its companion, No. 74-1035, may obscure what is at stake for these parties and for all who are affected by the administration of the NLRA. As far as petitioner unions are concerned, the question herein is no less than whether the protections of the National Labor Relations Act will remain available to them against a recidivist employer; conversely, the Company, despite its original defeats in *Weil-Peterson* (440 F.2d 85) and *Sherman,* hopes finally to achieve *de facto* immunity from the Act by virtue of the Board's "deferral" to an arbitrator who is not charged with the duty of remedying and preventing unfair labor practices.

In larger terms, the ultimate issue is whether enforcement of the Act shall terminate once a collective bargaining agreement is executed which provides for grievance arbitration of some (though not necessarily all) disputes and the unfair labor practice charge is not one involving a possible conflict between the union and the aggrieved employee on behalf of whom the charge is filed, and does not allege a violation of §§8(b)(4)-(7) of the Act. We

know from *National Radio* and the instant cases that it is no longer a prerequisite for deferral that adjudication of the unfair labor practice charge entails interpretation of a collective bargaining agreement. We also know from the same source that charges of employer discrimination are no longer excluded from deferral, and we know from these cases that charges of unlawfully withholding information and other interference with the grievance procedure are likewise no longer exempt from deferral. We know from these cases, and contrary to the Board's prior assurances, that a respondent's prior history of unfair labor practices does not inhibit deferral, even if some of the past violations were of the same character as the new charges which the respondent seeks to remit to arbitration. These cases also demonstrate that the Board will defer even where the respondent is under no obligation to arbitrate the question whether the misconduct charged to be an unfair labor practice is also a breach of contract. Thus, it is *the respondent* who is given a choice of forum by the Board—he can block arbitration and (after gaining delay) defend before the Board, or he may agree to arbitrate and avoid ever having to defend before the Board since, under *Malrite*, he can escape Board sanctions altogether if he *loses* before the arbitrator. See p. 15, *supra*.

Finally, these cases are the first in which the Board has engaged in both pre-arbitration and post-arbitration deferral on a single record. It is thus possible to focus clearly on the practical consequences of the Board's entire deferral policy. When this is done, it becomes clear that the Board's characterization of deferral as merely a "temporary withholding of its processes" (Bd. Br. 19, 21, 24, n.14), vastly understates its consequences. Pre-arbitration deferral (*Collyer* as subsequently expanded) changes the focus of the unfair labor practice proceeding completely. For when the case comes back to the Board, the issues are not whether the respondent has committeed an unfair labor practice, and if so, what remedy will effectuate the pro-

cesses of the Act. They are, rather, whether the arbitrator's decision was repugnant to the Act and whether the respondent has complied with any award of the arbitrator. Moreover, and most strikingly, if the arbitrator had found that the respondent has engaged in conduct which would be an unfair labor practice, but has provided a remedy for that conduct under the contract, the Board will dismiss the unfair labor practice complaint (*Malrite*), even though the Board would deem the remedy inadequate if it had found the conduct violative of the Act. "Deferral," then, entails not merely delay in enforcement of the statute, but, in practice, equals *pro tanto* repeal.

The judgment of the Board should be reversed.

Respectfully submitted,

PLATO E. PAPPS
Machinists Building
Washington, D.C. 20036

MOZART G. RATNER
818 18th Street, N.W.
Washington D.C. 20006

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the Reply Brief of Petitioner Unions on Elliott W. Moore, Assistant General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D. C. 20570, by regular mail.

Mozart G. Ratner

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